Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

DAVID H. N. BEAN
Appellant

V.

VIRGINIA STATE BAR
Appellee

(Virginia Supreme Court Record No. 050508)

CORRECTED PETITION FOR WRIT OF CERTIORARI

Robert J. Harris, Esquire
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Leesburg, Virginia 20175
(703)771-2469
Counsel for Petitioner

QUESTION PRESENTED

HAVE THE DUE PROCESS RIGHTS OF A LAWYER BEEN VIOLATED WHEN HIS LICENSE TO PRACTICE HAS BEEN SUSPENDED FOR CONDUCT NOT SPECIFICALLY ENUMERATED IN THE PROCEDURAL RULE HE IS ALLEGED TO HAVE VIOLATED?

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JURISDICTION

This is an appeal from a ruling of the Virginia Supreme Court on an important question of federal law, which ruling was contained in an Order dated July 8, 2005 and the subsequent denial of a Petition for Rehearing dated September 23, 2005. This Corrected Petition is timely filed as it is being submitted within the sixty (60) day extension granted to the Petitioner after the filing of his original Petition, which was submitted within ninety (90) days from the denial of the Petition for Rehearing, in accordance with 28 U.S.C. Section 2101(c).

OPINIONS BELOW

The opinions below are set forth in the Order of the Virginia Supreme Court dated July 8, 2005 (Appendix p. 2) and the Order of Suspension of the Virginia State Bar dated December 20, 2004 (Appendix p. 6).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1. 28 U.S.C. Section 2101

2. U. S. Constitution, Amendment 14

3. Virginia Supreme Court Rule 4:1(b)(4)(A)(1)

STATEMENT OF THE CASE

1. The Petitioner is a lawyer whose license to practice in Virginia was suspended for two years, effective November 10, 2005, for alleged violations of ethical standards which were in turn predicated on alleged violations of a discovery rule in the course of civil litigation.

2. The Action against the Petitioner was commenced by a Complaint to the Virginia State Bar by one Audrea Hite Wynn, II, M.D., a physician whom the Petitioner had previously designated as an expert witness in a medical malpractice case against another physician. The Petitioner gave a written

summary of the testimony he expected Dr. Wynn to provide, as required by the relevant discovery rule, to wit: Virginia Supreme Court Rule 4:1(b)(4)(A)(i), which states as follows:

> "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

The summary provided by the Petitioner was based primarily on statements related to him by his client, James Robert Anderson, who had been the Complainant's patient, as to what the Complainant had told him her opinion was. More particularly, the Petitioner's client told him that the Complainant said of the Defendant doctor's work that "there was too much cut out [of his shoulder]", that the surgery was "unnecessary", and that the result was "so bad she wouldn't touch it", and she then referred him to a

specialist for pain relief. The Complainant was a medical doctor and a consulting physician to the client/patient. She gave a second opinion to him in laymen's terms which was highly critical of the surgery performed by the Defendant in the case, and this statement of the Complainant's opinion was relied upon by the Petitioner in preparing the summary of the Complainant's "expected testimony". The Complainant later denied holding that opinion and complained to the Bar. The Bar took the position that the Petitioner's designation of the Complainant and other experts learned of in the investigation of the Complainant's allegations, and his submission of summaries of their "expected testimony" without contacting the experts in advance or obtaining their agreement or consent violated the Rule and constituted ethical offenses as well.

3. The Petitioner contended in the hearing before the Virginia Disciplinary Board (among other

things) that the Discovery Rule he was alleged to have violated, Virginia Supreme Court Rule 4:1(b)(4)(A)(i), was unconstitutionally vague and ambiguous, on its face and as applied to him.

4. The Board rejected this position and on December 20, 2004 they issued an Order suspending the Petitioner's license for two years, notwithstanding the fact that the Petitioner had been a lawyer for thirty (30) years and had no prior disciplinary record.

5. That Order was timely appealed to the Virginia Supreme Court and its execution was stayed pending that appeal.

6. The Virginia Supreme Court upheld the Board's ruling and denied the Petitioner's appeal in an Order dated July 8, 2005 and denied Mr. Bean's Petition for Rehearing in an Order dated September 23, 2005. The Petitioner subsequently filed a Motion for Deferral of Mandate and Stay of Execution pending appeal to this Court, which was denied, and

the Board issued a new Order of Suspension dated November 10, 2005 and effective immediately.

7. The present Petition seeks review and reversal of the above-described rulings and reinstatement of the Petitioner's license to practice law in the Commonwealth of Virginia.

Q. Go right ahead.

ARGUMENT

The Petitioner contends, as he did below, that the Discovery Rule he is alleged to have violated, Virginia Supreme Court Rule 4:1(b)(4)(A)(i), is unconstitutionally vague and ambiguous, on its face and as applied to him.

1. His basis for this claim is this: While it is well settled that the regulation of professions in general is within the prerogatives of the states, and not violative of Due Process requirements, 16 Am Jur 2d, Constitutional Law, Section 334, 7 Am Jur 2d, Attorneys at Law, Section 2, In Re Peterson (BC, DC

Conn) 163 BK 665, 25 BCD 394, 30 CBC 1457 CCh Bankr. L. Rptr. Paragraph 75750, Wallace v. Wallace, 25 Ga 102, 166 SE2d 718, cert den 396 U.S. 939, 24 L Ed 2d 240, 90 S. Ct. 369, it is equally clear that a state cannot, in regulating the professions, ignore the rights secured by individuals in the Constitution, including the Due Process protections in the 14th Amendment. Due Process protections have, moreover, been specifically held by this Court to extend to attorneys in connection with the state regulation of the practice of law. See In Re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, 43 Ohio Op. 2d 459 (1968), reh'g den, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed 2d 874 (1968). The essence of the "void-for-vagueness" doctrine is that a statute (or in this case a regulation) cannot be enforced if it is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited (or required). U.S. v. Marsh, 84 F 3rd 110 (9th Cir.) 1998.

The statute (or regulation) must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited (or required) and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. Marsh, supra. The Rule states that when requested in discovery the litigants must designate the expert witnesses they intend to call at trial and summarize, inter alia, the "expected testimony" of each such expert. A logical reading of this requirement would seem to allow the attorney the option of providing a summary of "expected testimony" based on medical records, deposition testimony of the expert, the client and others, clients and witness interviews, and any other credible information gleaned from the attorney's investigation that would provide a reasonable basis for the expectation that the expert's testimony would be as stated when it is to be adduced in court. There is no requirement stated in the

promulgated Rule that the "expected testimony" be the actual testimony of the expert (e.g., in a prior proceeding). There is no requirement in the Rule that the expectation be based upon a deposition or written opinion . The only relevant requirement in the language of The Rule is that the attorney summarize what the expert is expected to say.

3. In the present case the Petitioner designated expert witnesses and summarized their expected testimony based on the information he had, but the experts denied the opinions attributed to them by the Petitioner. There was no evidence whatsoever that the Petitioner's summaries of "expected testimony" were not genuinely believed by him to be accurate, or that he intentionally misled or attempted to mislead anyone. One of the experts complained vehemently to the Bar on the basis of the fact that the Petitioner had not contacted her prior to designating her as an expert witness or obtained her agreement or

consent to be so designated, her wish not to become "involved" in the subject dispute, and the embarrassment and inconvenience she allegedly suffered in her dealings with her colleagues as a result of the summary of "expected testimony" set forth by the Petitioner.

4. When she later recanted the opinion she had related to her patient, the Petitioner's client, and complained to the Bar, the Bar took the position that the Petitioner's designation of her and the other experts and his submission of the summaries of "expected testimony" without contacting the experts in advance or obtaining their agreement or consent violated the Rule. This position was ultimately upheld by the Virginia Supreme Court, and the Petitioner, who had previously been in practice for thirty (30) years with no prior disciplinary record, received a two (2) year suspension of this license.

5. The Petitioner's dispute with this logic is that the Rule does not say he was required to contact the experts in advancer or obtain their agreement or consent to be designated as expert witnesses, nor does it say that he had to obtain the information forming the basis of his expectation of what their testimony would be from the experts themselves. To impose such additional requirements on the Petitioner's conduct in preparation for trial, not specified in the language of the Rule, the Petitioner contends, is unconstitutional and a violation of due process under the 14th Amendment to the U.S. Constitution.

6. It would seem, moreover, that the Attorney should have the flexibility to presume that the physician would not be untruthful concerning the testimony she was expected to give at trial. A contrary view by the legal community condones medical errors and allows their perpetuation by a physician who conducts a medical practice in the

same locale as a negligent physician, whose negligence becomes known to the consulting physician , as in this case, when she examines the patient and yet determines that she does not want to "get involved" because to do so would be "bad for business".

7. If the Rule stated that an attorney should get written opinion of an expert before designating her as an expert, this case would not be before the Court. Instead, because the Rule is broad, vague and ambiguous as written, but is narrowly interpreted as to the notice, the Rule as applied is unconstitutional. The Rule simply does not provide notice that an attorney shall confer with a proposed expert, get agreement or consent to be designated, or get an opinion directly from her prior to disclosing her "expected testimony". While it has been held that narrow interpretation of a vague or overbroad statute can avoid violation of Due Process protections, that is

not so when the interpretation is unexpected or unforeseeable. Marks v. United States, 430 U.S. 188, 97 S. Ct. 990, 51 L Ed 260 (1977). Frankly, it would seem difficult to imagine a more "unexpected" or "unforeseeable" interpretation of the Rule in this case than that which has been handed down by the Virginia Supreme Court, wherein additional requirements, not enumerated in the text of the Rule, are essentially made up "out of whole cloth" and "tacked on" to the language.

WHEREFORE, your Appellant prays that his Corrected Petition for Writ of Certiorari be granted, and that this Court accept this case for full review of the issue set forth herein.

Respectfully submitted,

DAVID H.N. BEAN,

By counsel

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APPENDIX

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Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 23rd day of September, 2005.

David H. N. Bean, Appellant,

Against Record No. 050508
V.S.B. Docket No. 02-070-1395

Virginia State Bar, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 8th day of July, 2005 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste:
Patricia L. Harrington, Clerk

By: original order signed by a Deputy clerk of the Supreme Court of Virginia at the Direction of the Court

Deputy Clerk

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of July, 2005.

David H.N. Bean, Appellant,

Against Record No. 050508
VSB Docket No. 02-070-1395

Virginia State Bar, Appellee.

Upon an appeal of right
From an order entered by the
Virginia State Bar Disciplinary
Board.

Upon consideration of the record, briefs, and argument of appellant, in proper person, and counsel for the appellee, the Court is of opinion that there is no error in the order appealed from.

On December 20, 2004, the Virginia State Bar Disciplinary Board (Disciplinary Board) entered an order holding that David H.N. Bean violated Rules 3.1, 3.3(a) (1), 3.4(e), 4.1(a) and 8.4(c) of the Virginia Rules of Professional Conduct and Rules 1-102(A) (4), 7-102(A) (2), 7-102(A) (5), 7-105(A) and 7-105(C) (1) of Virginia Code of Professional Responsibility.[1] As a sanction for these violations, the Disciplinary Board suspended Bean's license to practice law in this Commonwealth for two years.

[1] The Virginia Code of Professional Responsibility was superseded by the VIRGINIA Rules of Professional Conduct effective January 1, 2000. The matters before the Disciplinary Board involved misconduct by Bean that occurred both before and after January 1, 2000, thus the Board applied the rules applicable at the time of each instance of misconduct.

On appeal, Bean contends that the Disciplinary Board erred in limiting his cross-examination of a witness, that the Board erred in finding that his actions were violative of the applicable rules of professional conduct, and that the sanction imposed by the Board was excessive. We find no merit in any of these contentions.

In several assignments of error, Bean contends that the Disciplinary Board erred in not permitting him to use certain out-of-court statements "to refresh the recollection" of a witness during cross-examination. He further contends that by not permitting him to use the out-of-court statements, he was denied the opportunity to fully and effectively cross-examine the witness.

During the hearing before the Disciplinary Board, Bean maintained only that he sought to use the out-of-court statements "for impeachment purposes" or for "rebuttal." Bean did not maintain that he was seeking to refresh the witness's recollection nor did he note an objection to the Board's ruling based on his procedural or due process right of cross-examination. Error will not be sustained to any ruling of the Disciplinary Board unless the objection was stated with reasonable certainty at the time of the ruling. Rule 5:25. Accordingly, we will not consider these assignments or error. See Pilli v. Virginia State Bar, 269 Va. 391, 397 n.*, 611 S.E.2d 389, 392 n.* (2005); Morrissey v. Virginia State Bar, 260 Va. 472, 481, 538 S.E.2d 677, 682 (2000); Tucker v. Virginia State Bar, 233 Va. 526, 532, 357 S.E.2d 525, 528 (1987).

In several other assignments of error, Bean contends that the Disciplinary Board erred in finding that his actions were violative of the applicable rules of professional conduct principally because the discovery and procedural rules he was found to have

violated in the underlying civil cases were not sufficiently specific to inform him that his conduct was improper. Bean also contends that the Board's findings amount to a denial of his due process rights under the 14th Amendment. We disagree.

As the Bar properly notes, the issue before the Disciplinary Board was whether Bean's conduct violated ethical standards for the practice of law. Bean's failure to comply with the rules of discovery in the underlying civil cases already was established by the findings of the trial courts in which those violations occurred, and Bean may not collaterally attack those findings in this proceeding.[2] The Board made specific factual findings with respect to how Bean's conduct violated the applicable ethical rules, and the record fully supports those findings.

Finally, Bean contends that the Disciplinary Board's imposition of a two-year suspension of Bean's license to practice law was excessive. The Disciplinary Board has wide discretion in determining the appropriate sanction for lawyer misconduct. Tucker, 233 Va. At 534, 357 S.E.2d at 529. On appellate review, the sanction imposed by the Disciplinary Board is presumed to be correct and will not be set aside on appeal unless we conclude that the sanction is contrary to law or unjustified based on a reasonable review of the record. Id. at 534, 357 S.E. 2d at 529.

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[2] This Court refused all appeals filed in each of the three cases at issue. See Carroll v. Winchester Regional Health Systems, Record No. 022112 (June 18, 2003); Anderson v. Winchester Surgical Clinic, Record No. 020547 (July 23, 2002); Atkins v. Spratt, No. 961127 (September 17, 1996). Moreover, because the appeal in Atkins expressly assigned error to the trial court's ruling on Bean's violations, Bean cannot be heard to profess ignorance of the requirements of the same discovery rules with respect to his subsequent conduct in Anderson and Carroll.

Although Bean has no prior disciplinary record before the Bar, the record here reflects that Bean's conduct involved dishonesty and a lack of candor with the court, other parties, and witnesses that was harmful to innocent people. Moreover, it is clear, given the passage of time between the first instance of misconduct and the last, the Bean followed a pattern of misconduct and willfully failed to adhere to the rules of discovery despite having been sanctioned by the trial courts for his misconduct. Thus, we conclude that the sanction imposed by the Disciplinary Board is not contrary to law and is justified by a reasonable review of the record.

Accordingly, the order of the Board is affirmed and the appellant shall pay to the appellee thirty dollars damages. This order shall be certified to the Virginia State Bar Disciplinary Board with instruction to enter an order after notice to appellant fixing the effective date of appellant's suspension and the date appellant shall comply with the provisions of Part 6, IV, 13M of the Disciplinary Rules.

A Copy,

Teste:

s/Patricia L. Harrington

Clerk

Virginia:

BEFORE THE VIRGINIA STATE BAR DICIPLINARY BOARD

IN THE MATTER OF	**VSB DOCKET NO.**
DAVID H.N. BEAN	**02-070-1395**

ORDER OF SUSPENSION

This matter came on to be heard on December 10, 2004, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of James L. Banks, Jr., Chair Designate, Bruce T. Clark, Glenn M. Hodge, Robert E. Eicher, and W. Jefferson O'Flaherty, lay member.

The Virginia State Bar ("VSB") was represented by Paul D. Georgiadis, Assistant Bar Counsel ("Bar Counsel"). David H.N. Bean (the "Respondent") appeared in person and represented himself. Valerie L. Schmit, Registered Professional Reporter, of Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, 804.730.1222, having been duly sworn by the Chair Designate, reported the hearing and transcribed the proceedings.

The Chair Designate inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude any of them from hearing the matter fairly and impartially. Each member of the panel and the Chair Designate answered the inquiry in the negative.

The matter came before the Board on an Amended Certification from the Seventh District Committee of the VSB and the Respondent's answer. On November 30, 2004, the Respondent filed a motion for continuance of the hearing in this matter. The chair Designate denied the motion for

continuance on December 1, 2004. The respondent stated at the hearing that he was ready to go forward. Following openings statements by Bar Counsel and the Respondent, Bar Counsel offered VSB Exhibits A and A-1 through A-14, VSB Exhibit B, and VSB Exhibits C and C-1 through C-10. The Respondent's pre-hearing objection to VSB Exhibit B and VSB Exhibits C and C-1 through C-10 was overruled by the Chair Designate in an order entered December 1, 2004. At the hearing the Respondent renewed his objection to VSB Exhibits C and C-1 through C-10. The chair Designate overruled his objection, and all of the VSB Exhibits were admitted into evidence. Bar Counsel then called the following persons who testified as witnesses for the Bar: Ann G. Scher, Andrea H. Wynn, M.D. and William D. Cremmins. Bar Counsel rested the VSB's case-in-chief and the Respondent then testified on his own behalf. The Respondent offered in evidence the transcripts of the deposition testimony of James R. Anderson and his wife, taken in the *Anderson* case, and audio tapes the Respondent represented to be a recording of his conversations with the client. Neither the transcripts nor the tapes had been pre-filled as exhibits as required by the Pre-hearing Order entered on August 13, 2004. Bar Counsel objected, and the Chair Designate sustained the objection. The Respondent proffered the transcripts, which were then marked as Respondent's Proffered Exhibits 1 and 2, respectively, for the record in the proceeding. The Respondent presented closing argument.

I. FINDINGS OF FACT

Upon consideration of the foregoing, the Board finds that the following facts have been proved by clear and convincing evidence.

1. At all relevant times the Respondent has been a lawyer duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar has been 258 West King Street, Strasburg, Virginia 22657. The Respondent has been licensed since 1968.

2. The Respondent was properly served with notice of this proceeding in accordance with Part Six, IV, 13(E) and (I)(a) or the Rules of the Supreme Court of Virginia.

Anderson v. Winchester Surgical Clinic, Ltd., et al.

3. The respondent was counsel of record for James R. Anderson in a medical malpractice action brought against Westchester Surgical Clinic, Ltd., and Thomas W. Daugherty, M.D., in the Circuit Court of Warren County, Virginia, Case No. L216-00.

4. Orthopedist Andera H. Wynn, M.D. saw the Respondent's client, James R. Anderson, on September 2, 1999. Mr. Anderson complained of right shoulder pain. After examining Mr. Anderson and reviewing x-rays he brought, Dr. Wynn recommended that he see Dr. Neviaser, who was a shoulder specialist, to do a specialized procedure to rebuild the musculature of the shoulder.

5. Dr. Wynn saw Mr. Anderson on September 1, 2000, regarding an injury to his hand. She inquired about his shoulder. He replied that Dr. Naviaser has performed surgery, and that it was helping him regain some function.

6. Dr. Wynn never spoke with the Respondent, or anyone in his office, about her findings or any opinion regarding his client's medical condition or the cause of or prognosis for the client's medical condition.

7. Dr. Wynn never spoke with the Respondent, or anyone in his office, about serving as an expert witness for Mr. Anderson condition.

8. On August 29, 2001, Respondent served a Notice of Designation of Experts on counsel for the defendants in whom he designated Dr. Wynn as an expert witness to testify on behalf of Mr. Anderson and summarized her expected testimony that Mr. Anderson's shoulder surgery preceding her examination of him was below the standard of care for such surgery and involved technical error, and that the surgeon who performed the surgery failed to elicit an informed consent from Mr. Anderson.

9. On October 4, 2001, before the commencement of her deposition, Dr. Wynn handed the Respondent a notarized writing in which she stated "I will not serve as an expert witness in the case."

10. The night before Dr. Wynn's deposition on October 4, 2001, the Respondent has his client's medical files delivered to Dr. Wynn with a request that she review them. Dr. Wynn testified that she did not review the files because she had not agreed to serve as an expert witness for Mr. Anderson.

11. Dr. Wynn's deposition on October 4, 2001, was the first occasion that she had seen or spoken with the Respondent.

12. At her deposition Dr. Wynn examined the portion of the Notice of Designation of Experts summarizing her expected testimony and testified that neither the Respondent nor anyone in his office spoke with her about the options summarized or whether she held those opinions. In fact, Dr. Wynn did not hold the options summarized in her expected testimony, and she had never authorized her designation as an expert witness.

13. At the deposition of Dr. Wynn, the Respondent said to her "Doctor, I realize that you were not apprized [sic.] of the fact that you were designated as an expert, ... Sometimes the designation is done with or without permission. Usually you like to get permission."

14. The Respondent states that he designated Dr. Wynn as an expert witness based on what his client told him Dr. Wynn had said during his client's office visits with her. For her part, Dr. Wynn denies expressing any medical opinion to the Andersons regarding his prior surgery, a deviation from the standard of care, or informed consent. Indeed, Dr. Wynn states that she could not form an opinion because she had not seen the medical records of the prior surgery.

15. The Respondent designated two other physicians as experts on behalf of Mr. Anderson in the Notice of Designation of Experts, David G. Urquia, M.D., and Thomas Neviaser, M.D., and included a summary or their expected testimony.

16. Dr. Urquia's deposition was taken on October 9, 2001. Dr. Urquia had agreed with the Respondent to review medical records that the Respondent was to send to him. Dr. Urquia received incomplete medical records and informed the Respondent that no review would be made until all of the medical records were received. Dr. Urquia did not receive any further medical records and never made a review.

17. Dr. Urquia never formed any medical opinions regarding Mr. Anderson and never agreed to serve as an expert witness or to be designated as an expert witness.

18. Dr. Neviaser's deposition was taken on October 18, 2001. He had not agreed to serve as an expert witness for Mr. Anderson. He did not know

that the Respondent has designated him as an expert in the Notice Of Designation of Experts until he received the portion of it pertinent to himself after it had been served on August 29, 2001. Contrary to the summary of Dr. Neviaser's expected testimony in the Notice of Designation of Experts, Dr. Neviaser testified that he would not give testimony regarding the prior surgeon's standard of care.

Mary Ann Carroll v. Winchester Regional Health Systems, Inc., et al.

19. The respondent was counsel of record for Mary Ann Carroll in a medical malpractice action brought against Winchester Regional Health Systems, Inc., et al., in the Circuit Court of Warren County, Virginia, Case No. 00-134.00.

20. On November 8, 2001 the Respondent served a detailed, ten-page expert witness designation in which he identified five physicians as standard of care witnesses and set forth the substance of their expected testimony that the defendant radiologist had violated the standard of care.

21. On December 17, 2001, the Court ordered the Respondent to require each of his designated expert witnesses to sign an endorsement of the expert witness designation stating "I have reviewed the Plaintiff's designation of my testimony, and I hereby affirm that the contents are true and correct to the best of my knowledge and belief, and that I hold the opinions therein expressed."

22. On January 17, 2002, the Respondent withdrew his previous designation of experts and filed a supplemental expert witness designation in which only two of the originally designated five physicians were named. None of the new designations contained any reference to any deviation from the standard of care by the radiologist-defendant. The Respondent non-suited Mr. Carroll's case.

23. The Honorable John E. Whetzel, Jr., was the presiding judge in both the *Anderson* case and the *Carroll* case and imposed sanctions on the Respondent in each case.

24. In *Anderson*, on November 20, 2001, Judge Wetzel ordered the Respondent to pay $11,192 to Winchester Surgical Clinic and Thomas W. Daugherty, M.D., and $11,192 to Warren Memorial Hospital in attorney's fees. In addition, Judge Wetzel barred the Respondent and his firm from representing Mr. Anderson if the no suited case were to be re-filed. Judge Wetzel also ordered that any designated expert witness must endorse all of the Respondent's expert witness designations and interrogatories.

25. In *Carroll*, on April 3, 2002, Judge Wetzel ordered the Respondent to pay $7,165 in attorney's fees and costs to defendant-Dr. Miller. Judge Wetzel also ordered that the Respondent may not file a medical malpractice action in the Commonwealth of Virginia "unless prior to the filing of the action, he has retained an expert witness who has stated in writing that the health care provider has violated the standard of care."

Atkins v. John A. Spratt, M.D.

26. The Respondent was counsel of record for Ronnie Ray Atkins in a medical malpractice action brought against John A. Spratt, M.D., in the Circuit Court of the City of Richmond, Virginia, Case No. LX-1789.

27. On December 6, 1995, the Respondent served his Second Supplemental Designation of Expert and therein identified A. Robert Tucker, M.D., as an expert witness for Mr. Atkins and summarized Dr. Tucker's expected testimony. Dr. Tucker's counsel, Ann G. Scher, inquired of the Respondent for the specifics of any deviation from the standard of care on Dr. Tucker's part. The Respondent informed

her that he count not give specifics because he has not yet talked with Dr. Tucker.

28. Dr. Tucker's deposition was taken on January 5, 1996. Dr. Tucker had agreed with the Respondent that he would review Mr. Atkins' medical records but informed the Respondent that because he did not consider himself an expert in Mr. Atkins' particular condition, he would not testify as an expert witness for Mr. Atkins. Contrary to the Respondent's summary of the expected testimony of Dr. Tucker believed Mr. Atkins' surgical procedure was excellent, and that there was no malpractice on Dr. Spratt's part.

29. In the *Atkins* case the Respondent was sanctioned $4,010.80 for designating Dr. Tucker as an expert witness when the Respondent knew that Dr. Tucker had refused to testify as an expert witness for Mr. Atkins.

30. The Respondent has paid the monetary sanctions, imposed on him in *Anderson, Carroll,* and *Atkins.*

31. Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme court of Virginia provides, as follows:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion...

32. Rule 4:1(e) of the Rules of the Supreme Court of Virginia provides, as follows:

A party who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired in the following circumstances.

(1) A party is under a duty promptly to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony, when additional or corrective information becomes available.

33. Code of Virginia 8.01-271.1 (1950), as amended, provides as follows, in pertinent part. The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

34. Bradley v. Poole, 187 Va. 432, 439, 47 S.e.2d 341, 344 (1948), states the following with respect to the relationship with an expert witness: When a litigant seeks the opinion and aid of an expert in a trial the relationship between the parties is different from that of an ordinary witness summoned to testify to some pertinent fact known to him. *In the former case the duty of the witness to attend the trial and give testimony, or otherwise aid the litigant, is created by contract.* In the latter case the duty of the witness to attend the trial and testify is a duty created

by law and arises out of necessity in the administration of justice...

(italics supplied.)

35. The Respondent's explanation of his conduct is that the "rules" did not require him to have personal communication with the physicians before his expert witness designations of them, that personal communication was prudent but not required, and that it was proper for him to rely on his clients, his examination of their medical records, and the texts he examined in serving his expert witness designations on opposing counsel.

II. DISPOSITION

The Board retired to a closed session to deliberate. Following its deliberation, the Board reconvened in open session and the Chair Designate announced it had unanimously found by clear and convincing evidence that the Respondent's conduct constitutes a violation of the following Virginia Rules of Professional Conduct, effective January 1, 2000, in the Anderson and Carroll matters, and the Disciplinary Rules of the Virginia Code of Professional Responsibility, effective before January 1, 2000, in the Atkins matter, to wit:

RULE 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal or existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

DR 1-102. Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(2) Knowing advance a claim or defense that is unwarranted under existing law, except that he may advance such a claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(5) Knowingly make false statement of law or fact.

DR 7-105. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rude of a tribunal or a ruling of

a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

The chair Designate then announced that the board had unanimously found that the VSB had failed to prove by clear and convincing evidence a violation of the following: Rule 3.3(a)(4), Rule 3.4(c), Rule 3.4(i), Rule 4.4, DR 7-102(A)(3), (4), or (6), and DR 7-105(C)(5) and (6).

III. SANCTION

Thereupon, the Board called for evidence in mitigation or in aggravation. Bar Counsel stated that the Respondent had no prior disciplinary record. Bar Counsel presented the testimony of Andrea H. Wynn, M.D. The Respondent presented his won testimony.

Thereupon the Board heard argument from Bar Counsel and Respondent and retired to a closed session for deliberation of sanctions. Following its deliberation, the Board reconvened in open session and announced it had unanimously determined that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for a period of two years, effective February 1, 2005.

Accordingly it is ORDERED that the license of the Respondent, David H.N. Bean, to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for a period of two years, effective February 1, 2005.

The Board notes that the Respondent's misconduct implicated and adversely affected

innocent people, particularly Dr. Wynn who testified to her embarrassment and the strain on her professional relationships in her medical practice. The Board also notes that, but for the absence of a prior disciplinary record, the monetary sanctions previously imposed in Richmond Circuit Court and Warren County Circuit Court, and the Respondent's professed acceptance of the lesson from those courts, the sanction imposed would be more severe. The Board observes that a lack of candor and trustworthiness between opposing counsel, as well as witnesses, ill-serves the profession and the adversary system of justice. The Board also observes that zealous representation of clients is inexorably circumscribed by the Virginia Rules of Professional Conduct.

It is further ORDERED that Respondent must comply with the requirements of Part Six, IV, 13 (M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within fourteen days of the effective date of the suspension, and make such arrangements as are required herein within forty-five days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, IV, 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, 258 West King Street, Strasburg, Virginia 22657, by certified mail, return receipt requested, and by hand to Paul D. Georgiadis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 20th day of December, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

"s/ James L. Banks"

James L. Banks, Jr., Chair Designate

RELEVANT TEXT OF CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS

1. 28 U.S.C Section 2101:

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by the law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any Judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

2. U.S. Constitution, Amendment. 14:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Virginia Supreme Court Rule 4:1(b)(4)(A)(1):

"A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

COPY OF TRANSCRIPT

VIRGINIA:

In the Circuit Court for Warren County

James R. Anderson,

Plaintiff,

At Law No. L00000216-00

v.

Thomas W. Daugherty, M.D., et al,

Defendant.

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The Deposition of **JAMES ROBERT ANDERSON**, taken in the above-styled matter in the Law Offices of **DAVID H. N. BEAN**, 116-118 Holiday Street, Strasburg, Virginia, on the 29th day of August, 2001, beginning at 10:10 a.m.

APPEARANCES

ON BEHALF OF THE PLAINTIFF:

David H.N. Bean, Esquire

BEAN LAW OFFICE

ON BEHALF OF THE DEFENDANT, THOMAS W. DAUGHERTY, MD. AND WINCHESTER SURGICAL CLINIC:

Stephen L. Altman, Esquire

MONTEDONICO, HAMILTON & ALTMAN, P.C.

ON BEHALF OF THE DEFENDANTS, MOET, MARROW AND WARREN MEMORIAL:

William D. Cremins, Esquire

CREMINS & ASSOCIATES, P.C.

ALSO PRESENT:

Sally Anderson

Sue Perkins

Heather Silbious

Alice Zent
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DEPONENT: Huh?

MR. BEAN: He's right, it's a Discovery deposition, and basically like we Talked about yesterday, you're supposed to give him information for the asking for it.

DEPONENT: All right.

MR. BEAN: If I don't like it, I'll object to it.

A. All right, Dr. Wynn stated that there was too much cut out of my shoulder, that it was unnecessary. She said it was so bad she wouldn't touch it, so she said I need a professional to fix my shoulder, and Dr. Neviaser stated that the only thing he could do for my shoulder was ease the pain, he could not promise me anything else for the condition it was in.

Q. It is your testimony that Dr. Neviaser did something different than what Dr. Daugherty did?

A. Yes, Sir.

Q. What did Dr, Neviaser do?

A. If I took my shirt off, I could show you, without a shadow of a doubt.

Q. Go right ahead.